

Kavita S.J.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.30 OF 2021

Riak Insurance and Financial Services & Ors., ...Petitioners

Versus

HDFC Bank Limited

...Respondent

Mr. Dharam Junani a/w Mihir Nerurkar & Sudip Mallick i/b Kiran Mohite, Advocates for the Petitioners.

Mr. Ashok Kotangle a/w Nikitesh Kotangle, Vishnu Chaudhari and Indu K., Advocates for Respondent.

CORAM : R.I. CHAGLA, J.

DATED : 8TH FEBRUARY, 2024.

ORDER:

1. By this Arbitration Petition, the Petitioners are seeking the setting aside of the impugned Award dated 14th December, 2019 passed by the Sole Arbitrator Dr. D.K. Sonawane.

2. A few facts are relevant to be adverted to whilst considering the issue as to whether there has been unilateral appointment of the Sole Arbitrator. These are as under:

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(i) The Petitioners and the Respondent had entered into a Used Car Dealer / DSA Agreement dated 24th July, 2013. Under Clause 22 of the Agreement, arbitration had been provided for. The disputes and differences between the parties to the Agreement were to be referred to a Sole Arbitrator to be nominated by the Respondent-Bank.

(ii) By Letter dated 17th September, 2018, the Respondent had demanded certain monies allegedly due under the Agreement and in case of non-compliance of the alleged demand, the Respondent had stated that they would be constrained to refer the dispute to the Sole Arbitrator to be appointed by the Respondent as per the terms of the arbitration clause in the said Agreement.

(iii) This was responded to by the Advocate for the Petitioners on 26th September, 2018 denying that there was a big amount due to the Respondent and calling upon the Respondent not to precipitate the matter any further based on the Notice. The Respondent was also called upon to furnish a copy of the Agreement dated 24th July, 2013.

(iv) Thereafter by a Letter dated 26th September, 2018 which is very same day as the Letter which had been addressed by the Petitioner, the Sole Arbitrator Dr. D.K. Sonawane, nominated pursuant to to reference Letter dated 26th September, 2018 sent by the Respondent, gave his written consent to act as Sole Arbitrator in terms of Arbitration Clause 22 of the said Agreement.

(v) The Sole Arbitrator in the said Letter dated 26th September, 2018 annexed the necessary disclosure as per the form specified in the 6th Schedule under Section 12(1) (b) of the Arbitration Act, wherein it was stated that the Sole Arbitrator had within the past three years received more than three appointments by the Claimant who is the Respondent herein.

(vi) Thereafter, by another Letter dated 26th September, 2018 the Sole Arbitrator Dr. D.K. Sonawane has again accorded his consent to act as Sole Arbitrator in the dispute which is alleged to have arisen under the said Agreement dated 24th July, 2013 and which was in response to the

Respondents' reference Letter dated 26th September, 2018.

3. The learned Counsel for the Petitioners has submitted that it is a well settled position of law that a unilateral appointment of an Arbitrator as in the present case is impermissible and on this ground alone, the Award is liable to be set aside.

4. The learned Counsel for the Petitioners has placed reliance upon the Judgment of the Supreme Court in *Perkins Eastman Architects DPC Vs. HSCC India Ltd.*¹, at Paragraphs 20 and 21 in this context.

5. The decision of the Supreme Court in *Perkins (supra)* had been relied upon by the learned Single Judge of this Court in *Naresh Kaniyalal Rajwani Vs. Kotak Mahindra Bank Ltd. & Anr.*, in Commercial Arbitration Petition (L) No.1444/2019 with IA(L) No.30023/2021. The learned Single Judge at Paragraph 7 of the said decision recorded the submission of the counsel for the Petitioner that the unilateral appointment of the Arbitrator is hit by Section 12(5) of the Arbitration Act read with the 7th Schedule thereof. Such appointment itself was vitiated in terms of this provision and the law

¹ (2020) 20 SCC 620

clarified by the the Supreme Court in the case of *Perkins (supra)*. Hence, the impugned Award deserves to be set aside on this ground alone. Further, the submission of the counsel for the Respondent-Bank therein was recorded viz. that the ground pertaining to Section 12(5) of the Arbitration Act was not specifically raised in the Petition. It was submitted that in the absence of such ground being specifically raised on behalf of the Petitioners, the same cannot be considered by the Court.

6. The learned Single Judge in the said decision upon recording these submissions has held that the issue of the arbitration proceedings being vitiated from the very inception on the ground of unilateral appointment of the Arbitrator by referring to Section 12(5) of the Arbitration Act goes to the very root of the matter. The learned Single Judge had considered the grounds of challenge raised in the Arbitration Petition and there was a specific ground with regard to the Award challenged being perverse, against settled provisions of law and public policy. Although, the ground appeared to be general in nature, the learned Single Judge held that it would cover the aforesaid specific ground raised on behalf of the Petitioner in the context of Section 12(5) of the Arbitration Act. This is because, the

same is a pure question of law which goes to the very root of the matter and therefore this Court was inclined to consider the same on merit.

7. Further, this Court in the said decision had noted that Section 12(5) has been inserted by way of amendment with effect from 23rd October, 2015. The said provision starts with the words “notwithstanding any prior agreement to the contrary”. The proviso to Section 12(5) of the Arbitration Act specifies the manner in which the parties may waive the applicability of the said provision, by an express agreement in writing. In that case, the Respondent-Bank had invoked arbitration in the year 2018, much after the aforementioned amendment had come into force. This Court had further noted that the application of Section 4 of the Arbitration Act which was waiver of right to object would show that even if applicability of Section 12(5) of the Act was to be waived, the same was required to be done only in terms of the proviso to Section 12(5) of the Act. It was held that merely because the Petitioners participated in the arbitration proceeding, they were not disentitled from raising the ground that the arbitration proceeding has been vitiated by unilateral appointment of the Arbitrator by the Respondent-Bank.

8. Further, in another decision of the learned Single Judge of this Court in ***Hanuman Motors Pvt. Ltd. Vs. M/s. Tata Motors Finance Ltd.***² has in paragraph 21 held as under:-

“21. In a recent judgment, rendered in the case of *Naresh Kanayalal Rajwani and Ors. Vs. Kotak Mahindra Bank Ltd. & Anr (supra)*, this Court deliberated upon and considered a situation where it was claimed that mere participation on the part of petitioners in the arbitral proceedings, resulted in waiving their right to raise such an objection to unilateral appointment of arbitrator. This Court found that a proper application of Section 12(5) of the said Act is a complete answer to the contentions raised on behalf of the respondent therein. Unless the party waives such an objection in writing, mere participation in the arbitral proceedings would not disentitle the party from specifically raising the issue. In the said case also, the petitioners had challenged an award passed by a sole arbitrator, by invoking section 12(5) of the said Act before this Court and it was found that the entire proceedings

² Arbitration Petition No.241 of 2022 dated 1st March, 2023.

stood vitiated because of unilateral appointment of the arbitrator. In the present case also, the sole arbitrator was unilaterally appointed by the respondent. There was no agreement in writing between the parties to waive objection pertaining to unilateral appointment of the arbitrator and therefore, the proviso to Section 12(5) of the said Act cannot operate. In such a situation, mere participation in the arbitral proceedings cannot disentitle the petitioners from raising the said issue in the present petition filed before this Court.”

9. Thus, in the said decision, the arbitral proceedings were held to be vitiated and the Award was held to be unsustainable on the ground of unilateral appointment and set aside on this ground alone.

10. The learned Counsel for the Respondent in the present case has raised the very same submissions which were considered by the learned Single Judge of this Court in ***Naresh Kanayalal Rajwani (Supra)***. He has contended that there is no specific ground of challenge in the Arbitration Petition with regard to unilateral

appointment of Arbitrator and / or the Award being vitiated on this ground alone. He has further submitted that there was deemed consent of the Petitioners to the appointment of the Arbitrator as the Petitioners have participated in the arbitration proceedings and this is apparent from the minutes of the arbitral proceedings on which he has placed reliance upon and tendered and which is taken on record and marked 'X' for identification.

11. The learned Counsel for the Respondent has submitted that the Award passed by the learned Arbitrator was after considering the submissions of the Petitioners and there was no objection raised during the arbitral proceedings. The only objection raised was with regard to limitation and that too after the learned Arbitrator had brought it to the notice of the Petitioner that his mandate was expiring, as the period of one year was coming to an end under Section 29(A) of the Arbitration Act. It was only after the mandate had expired that the Petitioner had raised an objection to the continuation of the learned Arbitrator in the arbitral proceedings.

12. The learned Counsel for the Respondent has further submitted that the learned Arbitrator has in the impugned Award

recorded that the Petitioner herein had applied for adjournment on the ground that the Petitioners / Respondents therein intended to file initial Defence Statement as well as intending to file Additional Defence Statement on the Rejoinder filed by the Claimant. The Claimant's Advocate had reminded the learned Arbitrator about the mandate of the arbitral proceedings coming to an end with the expiry of twelve months from completion of pleadings and this was recorded in the minutes of the meeting dated 6th July, 2019 when the matter was adjourned to 2nd August, 2019. Thereafter, on 2nd August, 2019, the Claimant appeared through its Advocate and the Petitioners were also represented by their Advocate. The Representative of the Petitioners had served Notice to the Claimant seeking certain documents based on which he had prayed for adjournment. The Advocate for the Claimant drew the attention to the Mandate and reminded the representative of the Petitioners to file their Reply to the Rejoinder at the earliest, to argue the matter on merit. Thereafter, the meeting was adjourned.

13. The learned Counsel for the Respondent has also referred to the Minutes of arbitral meeting dated 4th October, 2019, wherein it was recorded that inspite of filing Application for adjournment, the

Petitioner filed application raising the question of limitation by stating that the period of limitation was over and matter should not be proceeded with. The mandate of the learned Arbitrator had expired on 25th September, 2019.

14. The learned counsel for the Respondent has attempted to distinguish the decision of the learned Single Judge of this Court in *Naresh Kanayalal Rajwani (Supra)* on the aforementioned participation of the Petitioners in the Arbitral Proceedings.

15. I have considered the submissions as well as the aforementioned facts on unilateral appointment of the Arbitrator which are undisputed viz. with regard to the appointment of the Arbitrator under Clause 22 of the Agreement by the Respondent herein which is borne out from the relevant correspondence addressed at the time of the appointment of the Arbitrator. There appears to be no doubt that the learned Arbitrator was unilaterally appointed. It is clear from a reading of Clause 22 of the Agreement, that the Sole Arbitrator is to be nominated by the Respondent – Bank. Further, it is apparent from letter dated 17th September, 2018 of the Respondent wherein the Respondent has stated that the Sole

Arbitrator will be appointed by the Respondent for adjudication of the disputes as per the terms of arbitration Clause 22 of the said Agreement. Further, the letter of the learned Arbitrator dated 26th September, 2018 to the Respondent in response to the Respondent's letter of same date accepting his appointment.

16. The submissions of the learned Counsel for the Respondent on there being deemed consent of the Petitioners in the appointment of the Sole Arbitrator, cannot be accepted. In this context it is necessary to reproduce Section 12(5) of the Arbitration Act, which reads thus:-

“Section 12(5) – Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator; provided that, parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing”

17. Thus, the applicability of Section 12(5) read with the 7th

schedule which does not permit such unilateral appointment can only be waived by express agreement in writing. In the present case, there is no written consent of the parties to waive the applicability of the aforementioned provision.

18. Further, the submission of the learned Counsel for the Respondent that the challenge to the Award cannot be entertained in view of there being no specific ground taken either in the arbitral proceedings or in the Arbitration Petition viz. on the unilateral appointment of learned Arbitrator vitiating the arbitral proceedings and rendering the Award amenable to be set aside on this ground alone, has not merit in view of the decision of this Court in ***Naresh Kanayalal Rajwani (Supra)*** . By the said decision this Court has held that in view of admitted facts, the issue of unilateral appointment of the Arbitrator and Award being vitiated on this ground as being contrary to Section 12(5) of the Arbitration Act is a pure question of law that goes to the root of the matter.

19. In the present case, as well there is no dispute on facts in so far as unilateral appointment of the Sole Arbitrator is concerned. Being a pure question of law as well as there being grounds in the

Arbitration Petition that the Award is without jurisdiction, patently illegal, perverse, based on no material or evidence, beyond the scope of the reference, vitiated by complete bias and non-application of mind and liable to be set aside which would include the ground of unilateral appointment of the Arbitrator vitiating the Award, this challenge can be considered.

20. I do not find any merit in the submission of the learned Counsel for the Respondent that the decision of the learned Single Judge of this Court in ***Naresh Kanayalal Rajwani (Supra)*** is distinguishable on facts. The well settled principle of law clearly applies to the present case.

21. Although, there have been submissions on whether the mandate of the learned Arbitrator had been terminated under Section 29(A) of the Arbitration Act, it is not necessary to consider this issue, in view of my finding that the appointment of the Sole Arbitrator is unilateral and thus, the Award is vitiated on this ground alone.

22. Accordingly, impugned Award dated 24th February, 2019 passed by the Sole Arbitrator Dr. D.K. Sonawane is set aside.

23. The Arbitration Petition is accordingly disposed of.
24. There shall be no order as to costs.

[R.I. CHAGLA, J.]